APPENDIX A

(Investment Company Act Release No. 5905)

ADMINISTRATIVE PROCEEDING
FILE NO. 3-1302

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
November 28, 1969

In the Matter of BERKSHIRE INDUSTRIES, INC. 360 Lexington Avenue New York, New York (812-2167) Investment Company Act of 1940— Section 17(b)	**MEMORANDUM OPINION AND ORDER WITHDRAWING APPLICATION AND DISMISSING PROCEEDINGS**

In these proceedings pursuant to Section 17(b) of the Investment Company Act of 1940, Berkshire Industries, Inc. has filed a withdrawal of its application for an order exempting from the provisions of Section 17(a) of the Act certain transactions incident to a proposed merger with its 95.5% owned subsidiary, American-Hawaiian Steamship Company, a registered closed-end non-diversified investment company. A group of American-Hawaiian stockholders, whom the hearing examiner granted leave to participate in these proceedings ("participants"), oppose the withdrawal. Briefs have been filed by Berkshire and participants.[1]

[1] Berkshire and participants submitted letters in response to the reply briefs which we have also considered.

Appendix A

The merger proposal as orignally submitted by Berkshire provided that the public stockholders of American-Hawaiian be paid $275 for each share of stock held by them. During the course of the extensive hearings, at which evidence was presented by applicant and participants relating to the value of the assets of American-Hawaiian, Berkshire increased its offer to $375; and at the close of the hearings the amount was increased to $575. Subsequently, we granted Berkshire's request to reopen the hearings to introduce evidence with respect to, among other things, recent transactions engaged in by American-Hawaiian assertedly having a bearing on the valuation of its stock. Shortly before the reconvened hearings were to begin, Berkshire submitted to participants a revised offer of $635 per share (plus an additional amount if certain construction costs proved to less than estimated). When participants indicated that the amount offered was not acceptable, Berkshire filed the instant withdrawal, citing, among other things, the further delay which it envisaged would be entailed by participants' continued opposition before the proposed transactions could be consummated.

Berkshire contends that the filing of its withdrawal effectively terminated these proceedings. Participants argue that withdrawal requires our permission and should be allowed only subject to various conditions requested by them, and they urge that the hearings should continue. However, assuming that our consent to withdrawal is required, we find no basis for denying withdrawal here. We see no purpose in taking additional evidence with respect to a proposal that has now been abandoned nor, as noted below, any reason to impose the requested conditions.

One of the conditions which participants request is that Berkshire and/or American-Hawaiian be required to re-

imburse them for their expenses and directed to pay a reasonable attorney's fee to their counsel, who took a very active part in the proceedings, the amount to be fixed after hearing. We do not have jurisdiction with respect to participants' expenses and attorney's fee.[2] Nor do we see any basis for imposing a further condition requested by participants respecting the composition of American-Hawaiian's board of directors. Participants allege that, contrary to the Act's requirements, one individual controls all of American-Hawaiian's directors, and ask that we appoint or require the appointment of three of the company's seven directors, or, if we deem it necessary, order a hearing with respect to this matter. We do not view this issue as germane to the instant proceedings under Section 17(b).[3]

Participants have pointed to Berkshire's statement that one reason for withdrawing its application is that it appears probable that American-Hawaiian may be in a position to apply for an order terminating its registration under the Act. They argue that Berkshire is attempting through termination of American-Hawaiian's registration to accomplish indirectly an elimination of the interests of public stockholders that it has failed to effect in a fair manner di-

[2] This conclusion does not, of course, preclude participants from taking legal action to pursue any remedy they may have in this respect.

[3] Participants also cite a 1967 purchase of American-Hawaiian stock by Berkshire's parent company at $275 per share under a contract which provided that if this Commission approved a higher price in these proceedings the selling stockholder would be paid the difference between that price and $275. They argue that, since Berkshire now admits to a valuation of at least $635 per share, withdrawal of its application works a fraud on the seller. Whatever the rights of the seller may be under the contract, we do not consider that such sale warants continuation of these proceedings under Section 17 of the Act. Moreover, Berkshire states that it and its parent company will permit ex-stockholders who sold their American-Hawaiian stock for $275 under such contracts to rescind the sales.

rectly. However, the interests of those stockholders would be considered in any proceeding on an application by American-Hawaiian for termination of its registration, participants would have an opportunity to introduce evidence, including relevant portions of the record in these proceedings, and any order terminating registration could reserve jurisdiction with respect to further proposals to eliminate the interests of American-Hawaiian's minority stockholders and impose such other conditions as might appear appropriate for their protection. Under the circumstances, since American-Hawaiian is still a registered investment company, no order is required, as participants request, directing it to comply with the provisions of the Act for as long as it has public stockholders.[4]

Accordingly, IT IS ORDERED that the application of Berkshire Industries, Inc. for an order exempting certain transactions incident to a proposed merger with American-Hawaiian Steamship Company from the provisions of Section 17(a) of the Investment Company Act be, and it hereby is, withdrawn, and that these proceedings be, and they hereby are, dismissed.

By the Commission (Commissioners OWENS, SMITH AND NEEDHAM), Commissioner HERLONG not participating and Chairman BUDGE absent and not participating.

/s/ ORVAL L. DU BOIS
Orval L. Du Bois
Secretary

[4] We also see no useful purpose to be served by our exploring, as further requested by participants, into the assertedly inadequate reasons given by Berkshire for withdrawal of its application, or with respect to whether Berkshire should have disclosed earlier in the proceedings that certain negotiations which could affect the value of American-Hawaiian stock were then in progress, especially since the transaction that resulted from such negotiations was one of those which formed the basis for Berkshire's subsequent request to reopen the hearings.

Participants' request for oral argument will be denied.